APPEAL NO. 021922
FILED AUGUST 29, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on June 26, 2002. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the third quarter.

The claimant appeals, contending that recent reports from the treating doctor do provide a narrative that specifically explains how the injury causes a total inability to work, that a functional capacity evaluation (FCE) does not constitute medical evidence, and that another hearing officer, in a prior case involving the first and second quarter, had reached a different conclusion. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) set out the statutory and administrative rule requirements for SIBs. At issue in this case is whether the claimant met the good faith job search requirement of Section 408.142(a)(4) through a total inability to work as set out in Rule 130.102(d)(4). The hearing officer's determination that the claimant's unemployment was a direct result of his impairment has not been appealed and will not be discussed further.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. The parties stipulated that the qualifying period for the third quarter was from December 22, 2001, through March 22, 2002.

The crux of the claimant's appeal is that another hearing officer in a prior CCH had decided the first and second quarters of SIBs, on basically the same evidence, in his favor, and that decision was affirmed by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 020990, decided June 10, 2002. The claimant refers to reports from Dr. A dated November 19, 2001, and February 18, 2002, as narrative reports from a doctor which specifically explain how the injury causes a total inability to work. Both these reports were considered by the prior hearing officer and found to meet the requirements of Rule 130.102(d)(4). The hearing officer in this case only references the November 19, 2001, report; however, the February 18, 2002, report, which states that the claimant is "unemployable" because he "is unable to be in any one

position more than a few minutes at a time," concludes that nothing has changed since Dr. A saw the claimant in November 2001.

Similarly both the prior hearing officer and this hearing officer reference an FCE performed on November 8, 2001. The prior hearing officer, as noted in Texas Workers' Compensation Commission Appeal No. 020990, *supra,* discussed the FCE at some length and explained how it did not show that the claimant is able to return to work. The hearing officer in this case interprets the FCE to show "an ability to perform work at the light duty level, with some postural restrictions that are consistent with a real world ability to work."

The only new or different evidence in this case vis-à-vis Appeal No. 020990, is a S.O.A.P. note from Dr. A dictated May 20, 2002, where Dr. A adds Darvocet to the claimant's medications, comments regarding the FCE, and concludes that while the claimant may be able to perform some basic functions "he would not be able to do that on an employable basis at someone else's needs." This hearing officer addressed that report commenting.

> A recent office note from [Dr. A], not within the qualifying period, indicates that he is adding Darvocet to Claimant[']s list of medications. It may be that taking such medication will cause Claimant to not be able to perform any type of work duties in the future, but that medication was added in May, 2002, and there was no testimony that Claimant[']s medications, during the qualifying period, caused drowsiness or lack of attention span so as to make him completely unemployable.

The claimant, in relying on the previous hearing officer's decision, seems to be asserting that the hearing officer in this case had before him the same evidence that the prior hearing officer had relied on. However, we note that although a copy of our decision in Appeal No. 020990, *supra*, is in evidence, the prior hearing officer's Decision and Order is not and while it seems that the evidence is the same or similar, the claimant has failed to prove his assertion that it was the same evidence sufficient to warrant reversal in this case.

We have also many times held that an appeals-level body is not a fact finder and would not substitute its own judgement for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). In this case, another fact finder obviously drew different inferences from essentially the same evidence and reached a different conclusion. We have also many times noted that although another fact finder could have drawn different inferences from the same evidence, which would support a different result, that does not provide a basis for us to reverse the hearing officer's decision on appeal. Salazar, *et al*. v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). That is true in the instant case. Further we have also previously stated that "each quarter is evaluated on it's own facts, and payment of SIBs in any earlier quarter cannot guarantee uninterrupted payment for

all future quarters." Texas Workers' Compensation Appeal No. 010500, decided April 18, 2001.

We conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly the hearing officers decision and order are affirmed.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert E. Lang
Appeals Panel
Manager/Judge

DISSENTING OPINION:

I respectfully dissent. First, I point out that the hearing officer refers to a January 19, 2002, letter from the treating doctor, which I do not find in the record. I believe that when the hearing officer mentioned a January 19, 2002, letter from the treating doctor, he meant to refer to the February 18, 2002, letter from the treating doctor, which is in evidence. Second, as the claimant points out, in Appeal No. 020990, the Appeals Panel affirmed another hearing officer's decision that the claimant in the instant case was entitled to SIBs for the first and second quarters, determining that there "is sufficient support for the hearing officer's decision."

It is clear to me from our decision in Appeal No. 020990, that the hearing officer who decided the claimant's entitlement to SIBs for the first and second quarters determined that the treating doctor's reports of November 19, 2001, and February 18, 2002, constituted sufficient narrative reports to meet the requirements of Rule 130.102(d)(4), and that the Appeals Panel also found them to be sufficient. These same two reports are in evidence in the case under review for the third quarter, but the hearing officer in the present case did not find them to constitute a sufficient narrative report. It is also clear to me from Appeal No. 020990 that the hearing officer who decided the claimant's entitlement to first and second quarter SIBs determined that the FCE of November 8, 2001, did not "show" that the claimant is able to return to work and provided an explanation for that determination sufficient to satisfy the Appeals Panel. That same FCE is in evidence for the quarter now under consideration, but the hearing officer in the present case found that the FCE shows an ability to work.

Rule 130.108(a) provides in part that "the insurance carrier shall not dispute entitlement to a subsequent quarter without considering a comparison of the factual situation of the qualifying period for the previous quarter with the factual situation of the current qualifying period." While I agree that the hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), that different fact finders can draw different inferences from the same evidence, that each SIBs quarter is evaluated on its own facts (subject to the carrier comparison in Rule 130.108(a)), and that our standard of review has been whether the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, nevertheless, I do not believe that we should affirm the denial of third quarter SIBs when that denial is based on what appears to me to be the same evidence on which we affirmed entitlement to first and second quarter SIBs.

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Robert W. Potts
Appeals Judge